Supreme Court, U.S.
FILED

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No. 97-628 OCT 8 1997

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In The

Supreme Court of the United States

October Term, 1997

CYNTHIA MYERS, as an individual and as Guardian Ad Litem for Maranda Bennett and Ashley Bennett,

Petitioner,

vs.

COUNTY OF VENTURA; VENTURA COUNTY PUBLIC SOCIAL SERVICES AGENCY,

Respondent,

-and-

BARBARA TILLOTSON, individually and as an employee of the Ventura County Public Social Services Agency,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED

1. Can the district court grant summary judgment sua sponte without permitting a party to present evidence opposing summary judgment?

2. Is a public official entitled to qualified immunity for a ministerial act?

3. Is a public official entitled to qualified immunity invoking the "following orders" defense?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix D — Order Of The United States Court Of Appeals For The Ninth Circuit Filed July 10, 1997 . 38a

Petitioner Cynthia Myers as guardian ad litem for Maranda Bennett and Ashley Bennett respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unreported opinion(s) of the Court of Appeals are reproduced in the Appendix filed herewith (App.) at 1a and 38a. The unreported order(s) of the district court in this case is reproduced at 8a and 17a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The pertinent provisions of the United States Code is 42 U.S.C. § 1983 as set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer

> for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The pertinent provisions of the Federal Rules of Civil Procedure Rule 56 as set forth below:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT OF THE CASE

On or about January 28, 1995 Barbara Tillotson, then a Child Protective Services Employee of the Public Social Services Agency of Ventura County received a report of the alleged sexual abuse of a minor, Ashley Bennett. Tillotson immediately investigated the report and found that there was a strong possibility that there was sexual abuse of Ashley Bennett by her 14 year old legally blind brother, Matthew Bennett. After interrogating Ashley Bennett, Maranda Bennett and Matthew Bennett, Tillotson offered Cynthia Myers, the mother of Ashley, Maranda and Matthew, an agreement which consisted of taking Matthew out of the Myers' home and placing him in the home of his maternal grandparents. Ashley Bennett and Maranda Bennett (the sister of Ashley and Matthew who had not been

molested in any way) were to continue to live with Cynthia Myers. Myers accepted the agreement and the new living arrangement was put in place immediately. This living arrangement began on January 28, 1994 and the evidence was that at no time did Myers or anyone else violate the agreement.

On or about Tuesday, February 1, 1994, Tillotson, acting on orders of the staffing committee prior to any judicial proceeding, without warrant, without court order and without any emergency or exigent circumstances, seized the minor female children, Ashley Bennett and Maranda Bennett, then seven and six years old respectively and took them from their school, from the custody of their mother Cynthia Myers and placed them in foster care with Mr. and Mrs. Wilkie, who were complete strangers to the children. On February 8, 1994, the Ventura County Superior Court ordered PSSA to return Ashley and Maranda to their mother's custody.

On or about March 20, 1995, Petitioner filed a complaint in the United States District Court for the Central District of California. With leave of the court, Petitioner filed a second amended complaint on June 16, 1995.

On July 10, 1995, Respondents filed a Motion for Summary Judgment requesting that the court grant all defendants absolute immunity, or in the alternative, qualified immunity. On August 21, 1995, an Order of the court denied in part and granted in part, Respondents' Motion for Summary Judgment. The court denied the motion as to absolute and qualified immunity to all defendants but dismissed Mastright, the County of Ventura and PSSA on other grounds.

The parties submitted a number of jury instructions and on October 31, 1995, a trial before a jury commenced. The jury took the case under submission on November 3, 1995. In

answering to the first question in Jury Instruction Packet #1, the jury found that there were no exigent circumstances. In answering the second question, the jury found that a person in Tillotson's position could have reasonably believed that exigent circumstances existed on February 1, 1994 requiring the placement of the Petitioners in protective custody. Pursuant to the instructions, the jurors never answered Nos. 3 and 4. The court then discharged the jury. The court then held that Respondent was entitled to qualified immunity.

On November 29, 1995, the court filed an Order finding that Respondent was entitled to qualified immunity. Petitioner then filed a Motion for Judgment as a Matter of Law, Motion for a New Trial and a Motion for Reconsideration. After Respondent submitted her opposition and without a hearing, the court affirmed its November 29, 1995 Order on January 19, 1996. In that Order, the court ordered the parties to submit additional briefing on the issue of ministerial acts. On April 17, 1996, the court affirmed its prior ruling on qualified immunity. A timely notice of appeal was filed.

On or about May 22, 1997, the United States Court of Appeal for the Ninth Circuit affirmed the judgment of the district court with Judge Thomas dissenting. The Court of Appeal held that there was no evidence that the Ventura County Public Social Services Agency had a policy, custom or practice of refraining from obtaining a search or arrest warrant or other judicial order when a child was taken into custody absent exigent circumstances, or that it refrained from adopting any policy regarding obtaining a warrant or court order absent exigent circumstances. The court declined to consider the issue of ministerial v. discretionary duty. Finally, the court held the contours of the emergency circumstances were uncertain and therefore, the law was not clearly established. The dissent found that the law was clearly established and absent exigent

circumstances, Respondent should not have been granted qualified immunity.

Petitioner filed a Petition for Rehearing and on July 10, 1997, the court denied the Petition without comment.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ: (1) in order to resolve a split between the federal circuit courts of appeals on two important questions concerning a plaintiff's rights in pursuing 42 U.S.C. § 1983 claims against peace officers; (2) because a court of appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision; and (3) because a United States Court of Appeals has decided an important question of federal law which has not been but, should be settled by the Supreme Court, and has decided a federal question in a way that conflicts with the applicable decisions of the Supreme Court.

Where a case is not fully adjudicated on the motion, the court shall ascertain what material facts are and are not, controverted. Fed. R. Civ. Proc. 56(d). The court did not fully adjudicate this matter but granted summary judgment to the County of Ventura and PSSA in spite of the fact that Respondents did not request summary judgment based on lack of a material issue in dispute; Respondents County and Ventura argued they were entitled to absolute immunity or, in the alternative, qualified immunity. The Court of Appeals has departed from accepted and usual course of judicial proceeding and has sanctioned the same departure by the district court by granting summary judgment where summary judgment has not been requested on a particular issue and that issue has not been briefed or argued.

There is a split amongst the circuits on the issue of whether a ministerial act which violates the constitutional rights of a person, entitles a public official to qualified immunity. As Respondents pointed out in their appellate brief, the Second[1] and Sixth[2] Circuits have concluded that a ministerial act that violates the constitutional rights of an individual does not entitle a public official to qualified immunity while the First,[3] Seventh[4] and Eighth[5] have held that there should be no distinction between ministerial and discretionary acts. This Court has held that only discretionary acts entitle a public official to qualified immunity. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Davis v. Scherer*, 468 U.S. 183 (1984). The issue that is not settled is what is a ministerial act and what constitutes a discretionary act and to what extent ministerial acts by public officials may be subject to qualified immunity.

There is a split amongst the circuits on the issue of whether a public official who followed orders, thus violating the constitutional rights of a person, is entitled to qualified immunity. The Fifth Circuit[6] and Eight Circuit[7] hold that merely following orders entitles a public official to qualified immunity. The Eight Circuit also held that a public official ". . . [W]ill not be allowed

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1. *Waltz v. Town of Smithtown*, 46 F.3d 162 (2nd Cir. 1995).

2. *Boretti v. Wuiscomb*, 930 F.2d 1150 (6th Cir. 1991).

3. *Horta v. Sullivan*, 4 F.3d 2 (1st Cir. 1993).

4. *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985).

5. *Seller by and Through Sellers v. Baer*, 28 F.3d 895 (8th Cir. 1994).

6. *Hare v. City of Cornith*, 36 F.3d 412 (5th Cir. 1994).

7. *Villanuena v. George*, 599 F.2d 851 (8th Cir. 1981).

to hide behind the cloak of institutional loyalty . . ." *Putnam v. Gerloff*, 639 F.2d 415 (8th Cir. 1981). The issue of whether a public official who follows orders absent discretion and in doing so, violates the constitutional rights of an individual, is entitled to a grant of qualified immunity. This issue has not come before this Court but has been decided differently by the circuits.

I.

THE DISTRICT COURT MAY NOT GRANT SUMMARY JUDGMENT SUA SPONTE ON AN ISSUE WHICH HAD NOT BEEN REQUESTED BY A PARTY, HAD NOT BEEN BRIEFED, UPON WHICH EVIDENCE HAS NOT BEEN REQUESTED OR PRESENTED, AND ON WHICH THE ISSUE HAS NOT BEEN ARGUED.

It is well recognized and widely acknowledged that district courts ". . . [P]ossess the power to enter summary judgment sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)

Fed. R. Civ. Proc. 56 read together with Fed. R. Civ. Proc. 16 permits a court to grant "partial summary judgment" or "partial summary adjudication." However, this order is interlocutory in nature and not a final judgment. *American Disabled for Accessible Public Transportation v. SkyWest Airlines*, 762 F. Supp. 320 (D. Utah 1991). Orders and/or ruling that fail to dispose of the entire matter are interlocutory, non appealable and like other pretrial orders, subject to subsequent modification. *Schwarzer, Hirsch & Barrans, The Analysis and Decisions of Summary Judgment Motions*, 139 F.R.D. 441, 496 n.298. The district court may only grant partial summary judgment where the order fully disposes of one or more counts of the complaint. *In Re Martin*, 130 B.R. 930 (Bankr. N.D. Ill. 1991).

On or about June 22, 1995, Respondents filed a Motion for Summary Judgment.[8] In that motion, Respondent requested judgment based upon absolute immunity or, in the alternative, qualified immunity. Respondents did not present any uncontroverted facts or submit any argument that there were no material issues of fact in dispute as to the County of Ventura or PSSA; their sole argument was based on immunity. In spite of the fact that whether Respondents had a policy, practices and procedures of Respondents was not presented in the motion, Petitioner addressed the issue of whether there was evidence as to whether PSSA had or did not have any policy, practice or procedures of any kind. Petitioner presented evidence to the court that Respondents had no policy but had a practice and procedure not to obtain a warrant before taking a child from his/her parents and that practice and procedure violated the constitutional rights of Petitioner. The district court found the evidence insufficient and granted judgment to Respondents with the caveat that "[W]hen this case is over, if you think that you were deprived of presenting the Monell claim, should a verdict in this case be contrary to you, you can present that position and I will consider it." The court dismissed the jury immediately after the verdict and Petitioner never had the opportunity to present the claim to the jury.

The district court and the appellate court has so far departed

8. The court considered the motion in spite of the fact that Respondents' motion was procedurally defective and failed to comply with several local rules. Local Rule 3.10.2 provides that any moving papers over ten pages must have a table of contents and no table of authorities; Respondents' motion was twenty-eight (28) pages in length but had no table of contents or table of authorities. Local Rule 7.14.1 provides that a moving party must file a Statement of Uncontroverted Facts and Conclusions of Law and a proposed judgment. Respondent filed seventy-two (72) uncontroverted facts but no conclusions of law to support those facts; this should have been fatal to the motion. Respondents did not file a proposed judgment.

from the accepted and usual course of judicial proceedings and has sanctioned such a departure, as to call for an exercise of the Supreme Court's power of supervision.

II.

A PUBLIC OFFICIAL IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR A MINISTERIAL ACT.

"Immunity generally is available only to officials performing discretionary functions." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 "We . . . hold the government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This Court held that executive officers were absolutely immune from damage suits if they were acting within the outer perimeter of their scope of authority and were performing a discretionary as opposed to a ministerial act. *Barr v. Matteo*, 360 U.S. 564, 575 (1959). A duty is ministerial only where the [order] leaves no room for discretion — that is — it specifies the precise action that the official must take. *Davis v. Scherer*, 486 U.S. 183, 196 n.14. While there is a need to protect officials who are required to use their discretion in the vigorous exercise of their duties, it is not unfair to hold liable the official who knows or should know he is acting outside the law. *Butz v. Economou*, 438 U.S. 478, 506 (1978). For a public official to be shielded, that official must posses sufficient discretionary power. *Howard v. Adkins*, 887 F.2d 134 (8th Cir. 1989).

The circuits are divided on whether there can be any ministerial acts at all. "A duty is 'ministerial' only where the statute or regulation [order] leaves no room for discretion — that is, it 'specif[ies] the precise action that the official must

take in each instance.' " *Seller by and Through Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994). At the same time, the *Sellers*, court stated "[W]e are unable to imagine the case in which the ministerial-duty exception [the *Davis* exception] ever could apply." *Id.* at 902.

By refusing to apply the ministerial act guideline to this matter, the district court and the appellate court has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure, as to call for an exercise of the Supreme Court's power of supervision.

III.

A PUBLIC OFFICIAL IS NOT ENTITLED TO QUALIFIED IMMUNITY WHEN INVOKING THE "FOLLOWING ORDERS" DEFENSE.

The following orders defense[9] does not entitle a public official to qualified immunity. That exact argument was made at Nuremberg and other subsequent trials of the same type. The argument is that government officials merely fulfilling the orders of their supervisors or their government may not be prosecuted for following those orders. We now heard that same argument in Bosnia on the charges of atrocities in concentration camps during the recent civil war. Those persons operating the camps who murdered, raped and otherwise tortured the prisoners were only following orders of their commanders and claim they should not be prosecuted for their acts. If we allow that argument to be the state of the law here, the same result will follow. The

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9. Generally called the Nuremberg Defense because this was the defense propounded by the Nazis in 1947 at Nuremberg. The Nazis argued that because they were only following the orders of Hitler and other high officials, they should not be held responsible. The world rejected that argument then and still rejects it.

demonstrator in the street, the protestor against any alleged government wrong or the parent of the alleged abused child can and will be subject to conduct of any government official and have no redress because the shield of following orders of their superior will entitle the official to qualified immunity. Surely each official will testify that they did not know they were violating a constitutional right of the protestor or demonstrator or parent or child, thus, entitling them to qualified immunity.

Respondent's argument is "[W]hen Tillotson carried through the results of the staffing meeting she did not lose her qualified immunity because of the 'ministerial duty' exception of Davis." The regulation or "order" was not breached; she carried it out and therefore is entitled to immunity. The theory is "do whatever my supervisor orders and I cannot get into trouble. Do it whether it is right or wrong. If the act is right, I am protected and if the act is wrong and violates the rights of anyone, I am still protected." This argument is wrong and to allow this argument to succeed violates the fundamental doctrines of this nation.

This Court has never addressed the issue of whether a public official is entitled to immunity when following orders and the circuits are divided on this issue. The Fifth Circuit held a public official is entitled to immunity when following orders. *Hare v. City of Cornith*, 36 F.3d 412 (5th Cir. 1994). Yet *Putnam v. Gerloff*, 639 F.2d 415 (8th Cir. 1981) held that the following orders defense fails when they knew or should have known their actions violated rights of others, agreeing with the Third Circuit decision of *Forsyth v. Kleindienst*, 599 F.2d 1023 (3rd Cir. 1979).

CONCLUSION

For the foregoing reasons, Petitioner prays the Court grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — MEMORANDUM AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 22, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-55123

D.C. No. CV-95-01756-SVW

MEMORANDUM*

CYNTHIA MYERS, as an individual and as Guardian Ad Litem for Does 1 and 2,

Plaintiff-Appellant,

v.

COUNTY OF VENTURA; VENTURA COUNTY PUBLIC SOCIAL SERVICES AGENCY,

Defendants,

and

BARBARA TILLOTSON, individually and as an employee of Ventura County Public Social Services Agency,

Defendant-Appellee.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted May 5, 1997
Pasadena, California

Before: MAGILL,** RYMER, and THOMAS, Circuit Judges.

Cynthia Myers (guardian ad litem for Does 1 and 2)[1] appeals a number of pre- and post-trial rulings by the district court in her action under 42 U.S.C. § 1983 arising out of the warrantless removal from school of two sisters following reports that their brother had sexually molested one of them. We lack jurisdiction to review the district court's April 17, 1996 order denying Myers's post-trial motion for judgment as a matter of law, *see* Fed. R. App. P. 4(a)(4), but on all other claims we have jurisdiction, 28 U.S.C. § 1291, and affirm.

I

Myers contends that the district court should not have granted summary judgment on her claim against the county, but we disagree. There is no evidence that the Ventura County Public Social Services Agency had a policy, custom or practice of refraining from obtaining a search or arrest warrant or other judicial order when a child was taken into custody absent exigent circumstances, or that it refrained from adopting any policy

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** Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

1. "Doe 1" and "Doe 2" have been substituted for the names of the minor children.

regarding obtaining a warrant or court order absent exigent circumstances. Standing's testimony that PSSA did not have a "policy" because it follows the Welf. & Inst. Code does not suffice; it is simply a statement that PSSA follows the law. Therefore, the district court correctly ruled that there is no liability under *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

II

Myers contends that the district court erred in granting summary judgment to Tillotson on her supplemental state law claim for a violation of Cal. Welf. & Inst. Code § 306(a)(2). However, that issue was not raised in the district court and is waived. *Beech Aircraft Corp. v. United States,* 51 F.3d 834, 841 (9th Cir. 1995); *see United States v. Whitten,* 706 F.2d 1000, 1012 (9th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984). Myers's complaint alleged a violation of Cal. Welf. & Inst. Code § 308, but she has abandoned that issue by making no argument with respect to it on appeal. *See Leer v. Murphy,* 844 F.2d 628, 634 (9th Cir. 1988).

III

Myers argues that the district court gave erroneous jury instructions on qualified immunity. Whatever error there may have been is harmless, however, because the court itself decided that Tillotson was entitled to qualified immunity in accordance with *Act Up!/Portland v. Bagley,* 988 F.2d 868 (9th Cir. 1993).

IV

Myers argues that Tillotson was performing a "ministerial duty" that precludes her from asserting qualified immunity. We

do not consider whether this is so, as Myers did not argue that the ministerial duty exception to qualified immunity applied to Tillotson until her December 18, 1995, post-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(b). The district court denied that motion April 17, but Myers did not amend her notice of appeal from the judgment (timely filed January 5, 1996) to include that ruling. We therefore lack jurisdiction to consider it. Fed. R. App. P. 4(a)(4).

V

Finally, Myers argues that the district court should not have granted qualified immunity to Tillotson because the law was clearly established that a social worker could not remove a child from school without a warrant or emergency circumstances; the "following orders" defense does not excuse Tillotson's conduct in light of her subjective belief that there were no exigent circumstances; and no reasonable social worker, objectively, could believe that exigent circumstances existed to justify a warrantless removal. We disagree.

"[T]he relevant question in the present case is whether a reasonable social worker could have believed that taking [the daughters] and holding [them] in temporary protective custody was lawful 'in light of clearly established law and the information' the social workers' [sic] possessed." *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989). Tillotson's subjective belief as to whether there were, or were not, exigent circumstances does not govern the qualified immunity inquiry. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

As Myers argues, it was clearly established that parents have a liberty interest in keeping families intact, and that children

should not be taken into custody without a court order and absent exigent or "emergency" circumstances. *See Caldwell v. LeFaver*, 928 F.2d 331, 333 (1991). But this interest is not absolute; rather, "[i]n an emergency situation, a state agency may remove children from their parents' custody when the children are subject to immediate or apparent danger or harm." *Id.* Tillotson suggests that the fact that a child who has been sexually abused may be subject to silencing, but we think this alone, without "immediate or apparent danger or harm" of sexual abuse, is not sufficient exigency. However, here as in *Baker*, we cannot say that the law was clearly established as to what did *not* constitute an emergency or an apparent danger in light of "the difficulties faced by social workers trying simultaneously to help preserve families and to protect vulnerable children from abuse." *Baker*, 887 F.2d at 187. Given uncertainty about the contours of emergency circumstances, a reasonable social worker could have believed there was apparent danger of sexual abuse to the sisters in view of the fact that one sister had repeatedly been molested by her brother, that the girls' mother appeared to discount the nature and severity of the brother's abusive behavior, that molestation persisted after Doe 2 told her mother that her brother did "icky things" to her involving her "privates," and that the temporary arrangement for housing the brother was problematic in light of the stepfather's work schedule.

Our conclusion that Tillotson was entitled to qualified immunity, as the district court found, has nothing to do with a "following orders" defense, and so we do not consider its possible relevance to this case.

AFFIRMED.

Appendix A

Myers v. County of Ventura (No. 96-55123)

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I concur with all of the majority's excellent analysis except Part V, from which I respectfully dissent. I would deny qualified immunity to social worker Barbara Tillotson because no emergency circumstance existed which justified a warrantless seizure of the children.

A parent has a constitutionally protected interest in the custody and care of his or her children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). At the time of this incident, the law was clearly established that a state agency may remove children from their parents' custody without a warrant only in an emergency situation when the children are subject to immediate or apparent danger or harm. *Caldwell v. LaFaver*, 928 F.2d 331, 333 (9th Cir. 1991).

Defense counsel virtually concedes there was no emergency in this case. Cynthia Myers, the mother of the children, sought help from the proper authorities because she was concerned her son was molesting her daughter. Myers and Tillotson agreed that the legally blind son would be removed from the home. Tillotson interviewed the son, who admitted the offense and asked for help. Days passed before the case was considered by the PSSA committee who ordered Tillotson to seize the children. When the decision was made, there was no evidence of imminent physical danger or molestation because the son had been removed from the home. Indeed, although it is not germane to our inquiry, Tillotson herself did not believe an emergency existed.

Under these circumstances, I cannot conclude that a reasonable social worker, taking into consideration the facts known at the time, would have believed that an emergency situation existed justifying the warrantless appropriation of the children. Plainly put, the County had sufficient time to obtain a warrant and should have done so.

The primary exigency offered by defense counsel at oral argument was the "silencing" effect that may occur when children remain in a dysfunctional environment. While there is little doubt that this may occur, "silencing" is not type of immediate physical danger contemplated by case law or statute which would justify a warrantless removal of the children. *See, e.g.*, Cal. Welf. & Inst. Code § 306. Further, this justification has little bearing here because the mother had proactively sought assistance and the children had provided cooperating interviews.

All that being said, I believe the majority has reached an equitable result in finding Tillotson entitled to qualified immunity. Tillotson's initial actions demonstrated appropriate consideration. She took the children into custody not on her own initiative, but on the direct orders of her superiors who have legal defenses. *Post facto* information tended to support the committee's conclusions. These factors made Tillotson's liability at trial, *sans* qualified immunity, problematic.

However, such divination is not within our province. Thus, on the legal question presented, I would decline to grant qualified immunity and remand for further proceedings. I would affirm in all other respects.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED NOVEMBER 29, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 95-1756 SVW (AJWx)

CYNTHIA MYERS, as Guardian ad Litem for Maranda Bennett and Ashley Bennett,

Plaintiffs,

v.

BARBARA TILLOTSON, individually and as an employee of Ventura County Public Social Services Agency,

Defendant.

ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Background

On January 28, 1994, Defendant Barbara Tillotson, a social worker with the Ventura County Public Social Services Agency ("PSSA") was assigned to the case of Ashley and Maranda Bennett. Ashley had told Tillotson that she had been sexually molested by her brother Matthew repeatedly over a period of approximately two years. The latest incident of molestation was alleged to have occurred on January 25, 1994. Matthew admitted

that he had molested Ashley. Ashley was seven years old at the time. Matthew was fourteen. Maranda was six.

After speaking with Mrs. Myers, Ashley and Maranda's mother, Tillotson agreed to allow the girls to stay with Mrs. Myers and to have Matthew stay at his grandparents' house in a neighboring town. The grandparents' house was empty because the grandparents were away at the time. Matthew's stepfather was to stay with Matthew at the grandparents' house. This arrangement was made on Friday, January 28.

That same day, Ms. Tillotson told her supervisor Mr. Fesuk about the arrangement she had made to have Matthew separated from the girls. Fesuk decided that the case should be reviewed at a "staffing" to be held on February 1. A staffing is a meeting of supervisors within PSSA to review a case.

On the morning of February 1, 1994, Tillotson spoke with Susan Hardy, a therapist working with Matthew. Hardy had spoken with Matthew on January 31, 1994. Hardy told Tillotson that Matthew had a maturity level of approximately 10 years and that he was in special education at his junior high school. Hardy also told Tillotson that it was important that there be no contact between Matthew and the girls.

At the staffing meeting, Tillotson presented the facts of the case to a group of her superiors. After reviewing the case, the staffing group decided that Ashley and Maranda should be removed from their home and placed in protective custody.

On February 1, 1994, Ashley and Maranda Bennett were placed in protective custody. To effect custody, Tillotson, Officer Lee Wilcox, and another social worker removed the two girls

from their school. None of the three persons involved in the seizure had a warrant to seize the girls. The girls were later returned to their mother's custody after a court hearing.

Plaintiffs sued Tillotson under 42 U.S.C. § 1983 for damages arising from the warrantless seizure of Ashley and Maranda. The Court found that genuine issues of material fact prevented a finding of qualified immunity at the pre-trial stage. A jury trial was held from October 31 to November 3, 1995.

On Friday November 3, the jury made two findings of fact. First, they found that there were no exigent circumstances on February 1, 1994 requiring the placement of Ashley and Maranda in protective custody. Second, they found that a person in Tillotson's position could have reasonably believed that such circumstances existed.[1]

Qualified Immunity

Social workers such as Tillotson are protected by qualified immunity against liability arising out actions taken before the initiation of judicial proceedings. *Meyers v. Contra Costa County Dept. of Social Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987),

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1. It now appears that it was inappropriate to put the general question of objective reasonableness to the jury. *see Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993) (Question of objective legal reasonableness is a question of law once genuine issues of material fact have been resolved). However, in light of the analysis below, the error if any was harmless.

The Court notes that neither party objected to the instruction under *Act Up!*. The only objection made was by Plaintiff as to the relevance of the question in light of *Graham v. Connor*. That objection is discussed below.

cert. denied, 484 U.S. 829 (1987). Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097 (1986).[2]

"[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3038 (1987). The parties do not dispute that Tillotson is "an official protected by qualified immunity." An official's actions are "objectively legally reasonable" unless: 1) they violate clearly established law; and 2) the facts alleged could not support a reasonable belief that the official was acting lawfully in light of clearly established law. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). Objective legal reasonableness is a

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2. Plaintiff argues that there can be no defense of qualified immunity whenever there is an "unreasonable" seizure in violation of the Fourth amendment. Plaintiff misunderstands the relevant law.

Generally, the question of qualified immunity is distinct from the merits of the alleged Constitutional injury. However, the Ninth Circuit has held that, in excessive force cases, the qualified immunity and Constitutional rights inquiries are one and the same. *see Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2612 (1995). Plaintiff wrongly assumes that the holdings of those cases apply to the case at hand.

The Ninth circuit has indicated that its holdings in the above cases applies only in excessive force actions. *see Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2612 (1995). Thus, because the claim at hand is one for illegal seizure, not excessive force, the *Hopkins* line of cases is inapplicable; the normal qualified immunity analysis applies.

question of law once genuine issues of material fact underlying the determination are resolved. *Id.*

In *Anderson, supra*, the Court held that a police officer could claim qualified immunity for a warrantless search even if no exigent circumstances existed justifying the search. In reaching its holding, the Court established that the most important aspect of the qualified immunity analysis is determining the level of particularity at which to conduct the inquiry. Thus, the mere fact that it was clearly established law that warrantless searches generally violated the Fourth amendment in the absence of exigent circumstances did not necessitate a finding that the officer's actions were objectively unreasonable. Rather, the Court reasoned that a court must ask whether it was clearly established that the circumstances the officer faced did not constitute exigent circumstances. If an officer could reasonably but mistakenly believe that exigent circumstances existed in light of clearly established law and the information possessed by the officer, then he is entitled to qualified immunity. *Id.* at 3039, 3040.[3]

Upon reviewing the case law, the Court concludes that a reasonable social worker would not have been on notice that placing the girls in protective custody under the circumstances which Tillotson faced was a violation of their Fourth amendment right to be free from unlawful seizure. Although it was clearly established that a social worker could not execute a warrantless seizure of a child absent exigent circumstances, *Baker v. Racansky*, 887 F.2d 183 (9th Cir. 1989) the contours of the exigent circumstances exception as applied to social workers were not clearly defined.

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3. An inquiry into the officer's knowledge at the time if the action is not a "subjective good faith" inquiry. *Anderson* at 3040.

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In *Baker*, a mother and her minor children sued under § 1983 for alleged violations of their due process and fourth amendment rights by social workers who placed the children in temporary custody without a prior court order. The social workers were investigating allegations that the father had sexually abused his son. After interviewing the child, the social workers took him into temporary custody without first obtaining a warrant or court order. On the same day, the father was arrested on suspicion of child abuse.

The plaintiffs argued that because the father was in jail, no immediate threat to the child existed and therefore placing the children into temporary custody without a warrant violated their Due Process and Fourth amendment rights. The Court found that the social workers' actions did not violate clearly established law and thus that they were entitled to qualified Immunity. The Court reasoned that the social workers' acted in an legally reasonable manner in placing the children in protective custody where there was reason to doubt that the mother would be able or willing to protect the child from further abuse if the father were released from jail. In so holding, the Court relied on two other cases in which qualified immunity was granted where children were placed in temporary custody despite the lack of an immediate threat of recurring abuse. *see Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1986) (Qualified immunity for officials who placed children into temporary custody even though alleged abusive fathers were in jail and mothers were not implicated); *Robinson v. Via*, 821 F.2d 913 (2d Cir. 1987) (Innocent spouse's inability to protect child may justify temporary protective custody.)

One weakness of the *Baker* opinion is that it focuses on the Due Process right to a pre-deprivation hearing rather than on

the Fourth amendment warrant requirement. However, because of its vagueness as to the distinction between the Due Process "emergency" exception and the Fourth amendment "exigent circumstances" exception, the *Baker* case only bolsters the argument that the law regarding when a child could be placed in protective custody without a warrant was not clearly established in this Circuit at the time Tillotson placed the children into custody. Rather, the implication of the *Baker* case is that a social worker can lawfully place a child into protective custody even when the child has been separated from the perpetrator if there is reason to doubt that the separation will be an effective safeguard. When dealing with summary placement of children into protective custody, the Courts have sufficiently blurred the boundaries of the normal exigent circumstances doctrine such that a social worker could reasonably believe that she could place a child into temporary custody even though prior steps had already been taken to eliminate any immediate danger of future abuse to the child.[4]

Tillotson's actions fall within this uncertain area of the law; therefore, she is entitled to qualified immunity. The undisputed

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4. The uncertainty in this area of the law is also underscored by the fact that, at the time Tillotson placed the girls into protective custody, the statute authorizing her actions only indicated that a warrant was not necessary where there was an "immediate danger of physical or sexual abuse." Cal. Welfare and Inst. Code § 306. In 1994, § 306 was amended to specify that before placing a child into temporary custody without a warrant, a social worker was to take into account whether the perpetrator had been removed from the child's home and whether the separation was likely to remain stable. 1994 amendments to § 306. One implication of the amendment is that, prior to 1994, social workers were uncertain whether they could still conclude that a child was in immediate danger where some steps had previously been taken to remove the perpetrator from the house, but where there was uncertainty about the stability of the separation arrangement.

facts in this case were that placing Matthew in his grandparents' home was only a temporary measure and an unorthodox one at that since it would have required the separation of Mr. and Mrs. Myers. In addition, Matthew was only fourteen years old at the time and would have been alone in the grandparents' home at unpredictable times because his step-father's job required him to be on call at all hours.

Tillotson also understood that Mrs. Myers had left Ashley alone with Matthew on at least one prior occasion even though Ashley had begged her mother not to do so and had told her mother that Matthew did "icky things" to her involving her "privates." Mrs. Myers had also explained to Tillotson that she did not believe that anything more than a game of "show and tell" had occurred between Matthew and Ashley. Given these facts, a reasonable social worker in Tillotson's position could have believed that it was inappropriate to continue the arrangement set-up on January 28 because there was a danger that the Mrs. Myers would allow Matthew to return to the house, endangering Ashley and Maranda.[5]

The reasonableness of this conclusion is underscored by the fact that Tillotson's supervisor Fesuk thought that it was necessary to call a staffing meeting after he learned of the unorthodox arrangement to which Tillotson had agreed and that the staffing group concluded that a new course of action was need to protect Ashley and Maranda. One factor in the staffing's decision was that Matthew was not incarcerated at the time, which meant that there was no guarantee he would not come into contact with the girls. In addition, Officer Lee Wilcox came

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5. Because the qualified immunity inquiry turns on an objective reasonableness standard, Tillotson's testimony that, she believed that Mrs. Myers would adhere to the arrangement is not fatal to Tillotson's defense.

to the independent conclusion that Ashley and Maranda should be placed in temporary custody. Wilcox was an officer with prior experience in child sexual abuse cases who had worked side by side with Tillotson on the Bennett/Myers case.

In light of *Baker* and the cases it relied on, a reasonable social worker in Tillotson's position could have concluded that it was lawful to place Ashley and Maranda in protective custody even though their brother had already been removed to another home.[6] Therefore, the Court finds that Tillotson is not liable for any damages arising out of the seizure because her actions were protected by qualified immunity.

IT IS SO ORDERED.

DATED: 11/29/95

s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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6. This is also not a case where the Defendant's actions were so egregious that it should have been obvious even without informative case law that those actions were unlawful. *see Backlund v Barnhart*, 778 F.2d 1386 (9th Cir. 1985).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED AUGUST 21, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 95-1756 SVW (AJWx)

CYNTHIA MYERS, as Guardian ad Litem for Maranda Bennett and Ashley Bennett,

Plaintiffs,

v.

COUNTY OF VENTURA, a political subdivision; VENTURA COUNTY PUBLIC SOCIAL SERVICES AGENCY; BARBARA TILLOTSON, individually and as an employee of Ventura County Public Social Services Agency; ELLEN MASTRIGHT, individually and as an employee of Ventura County Public Social Services Agency and DOES 1-100 INCLUSIVELY,

Defendants.

ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

On January 28, 1994, seven year old Ashley Bennett reported to defendant Barbara Tillotson, a social worker for the County of Ventura Public Social Services Agency ("PSSA"), that she had been sexually molested by her fourteen year old

brother Matthew repeatedly over a period of approximately two years, most recently on January 25, 1994. Ashley told Tillotson that she had previously complained to her mother about Matthew's conduct and that she had begged her mother not to leave her alone with Matthew on January 25. Matthew admitted to molesting Ashley on several occasions.

Tillotson informed Ashley's mother, Cynthia Myers, that Matthew could not have any contact with Ashley and advised her of three remedial options. (1) Ashley could be placed in foster care; (2) Matthew could be placed in Juvenile Hall; or (3) Matthew could reside with his stepfather in his grandparents' home while the mother and her daughters resided in the family residence. Myers agreed to the third option and arranged for Matthew to stay at his grandparents' house.

On February 1, 1994, defendant Tillotson and Detective Lee Wilcox filled out applications for Juvenile Court petitions pursuant to California Welfare and Institutions Code § 653, alleging that Ashley and Maranda, Ashley's six year old sister, were within the jurisdiction of the juvenile court under Welfare and Institutions Code § 300. There is no evidence that these applications to commence juvenile court proceedings were ever filed with a court or agency on this date.

On February 1, 1994, after completing the applications, defendant Tillotson and Detective Wilcox proceeded to the children's school and placed Ashley and Maranda under protective custody. While waiting at the school, Maranda told defendant Tillotson that the entire family, including Ashley and Matthew, had gone kayaking the weekend of January 28-31, 1994 and that . . .

* * *

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. . . fact, and that the County, PSSA, and its employees are entitled to absolute immunity from suit for the alleged violations or, in the alternative, that they are protected from liability by qualified immunity. Furthermore, if the Court declines to grant summary judgment for defendants, defendants request the Court to find that plaintiffs' claims for punitive damages against defendants lack merit. For the reasons stated herein, the Court hereby GRANTS in part, and DENIES in part, defendants' Motion.

II. Plaintiffs' Claims

A. Plaintiffs' § 1983 Claims

Plaintiffs allege three federal civil rights violations: (1) the removal by PSSA social workers of Ashley and Maranda from the custody of their parent on February 1, 1994, and detention of the children in shelter care until their return to their mother's custody on February 9, 1994 pursuant to court order; (2) the appearance and participation in court of social workers assigned to the plaintiffs' case; and (3) visits by social workers to the children's school in March and May of 1994.

B. Plaintiffs' State Claims (under Welfare and Institutions Code § 308)

Plaintiffs claim that defendants violated California Welfare and Institutions Code § 308 by: (1) taking custody of plaintiffs on February 1, 1994 and not informing their mother of their location until February 7, 1994; (2) failing to obtain a court order allowing nondisclosure of plaintiffs' location; (3) failing to initiate a telephone call within five hours after the children were taken into custody, and instead waiting four days; and (4)

imprisoning the children and holding them incommunicado without good cause.

III. Applicable Law

A. Plaintiffs' § 1983 Claims

Section 272(c) of the California Welfare and Institutions Code authorizes a social worker in a county welfare department to perform the duties specified in Section 306. Section 306(a) provides:

> [a]ny social worker in a county welfare department, *while acting within the scope of his or her regular duties under the direction of the juvenile court* . . . may . . . (2) [t]ake into and maintain-temporary custody of, without a warrant, a minor who has been declared a dependent child of the juvenile court under Section 300 or who the social worker has reasonable cause to believe is a person described in subdivision (b) or (g) of section 300, and the social worker has reasonable cause to believe that the minor has an immediate need for medical care or is in *immediate danger of physical or sexual abuse or the physical environment noses an immediate threat to the child's health or safety.*

(emphasis added).

Section 300 describes minors within the jurisdiction of the juvenile court which may be adjudged dependent children of

the court. Subdivision (b) confers juvenile court jurisdiction when a:

> minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor, or the willful or negligent failure of the minor's parent or guardian to adequately supervise or protect the minor from the conduct of the custodian with whom the minor has been left . . . .

B. Plaintiffs' State Claims

Section 308 of the California Welfare and Institutions Code (the subject of plaintiffs' state claim) provider, in pertinent part, as follows:

> (a) When a peace officer or social worker takes a minor into custody pursuant to this article, he or she shall take immediate steps to notify the minor's parent, guardian, or a responsible relative that the minor is in custody and place where he or she is being held, except that, upon order of the juvenile court, the parent or guardian shall not be notified of the exact whereabouts of the minor . . . . [I]f it is impossible or impracticable to obtain a court order authorizing nondisclosure prior to the detention hearing, and if the peace officer or social worker has a reasonable belief that the

> minor or his or her foster family would be endangered by the disclosure of the minor's exact whereabouts, or that the disclosure would cause the custody of the minor to be disturbed, the peace officer or social worker may refuse to disclose the place where the minor is being held. The county welfare department shall make a diligent and reasonable effort to ensure regular telephone contact between the parent and a child of any age, prior to the detention hearing, unless that contact would be detrimental to the child. The initial telephone contact shall take place as soon as practicable, but no later than five hours after the child is taken into custody. The court shall review any such decision not to disclose the place where the minor is being held at the detention hearing, and shall conduct that review within 24 hours upon the application of a parent, guardian, or a responsible relative.

IV. Standard of Review

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party in entitled to judgment as a matter or law." Fed. R. Civ. P. 56(c). The Court must grant a Motion for Summary Judgment unless the opposing party produces evidence from which a "fair minded jury could return a verdict" in its favor. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512-2513 (1986). Inferences are to be drawn in favor of the nonmoving party. *Baxter v. MCA Inc.*, 812 F.2d 421 (9th air. 1987), *cert. denied*, 484 U.S. 954 (1987).

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V. Analysis

A. Absolute Immunity for the § 1983 Claims

Defendants' Motion for Summary Judgment rests on the claim that the County, PSSA, and its employees are entitled to absolute immunity for the alleged violations of plaintiffs' civil rights.

1. Removal from Parental Custody

Plaintiffs claim that defendants removed the girls from their mother's custody without justification and in violation of plaintiffs' civil rights. Defendants respond that placing the girls in protective custody represented a quasi-prosecutorial function within California Welfare and Institutions Code § 306 and thus warrants absolute immunity from liability.

Social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings. *Meyers v. Contra Costa County Dept. of Social Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987). However, actions prior to the initiation of dependency proceedings are not so protected. *Id.* Thus, the fundamental question presented to the Court is whether removing plaintiffs from their mother's custody on February 1, 1994 represented a prosecutorial function relevant to the initiation or pursuit of dependency hearings.

The Court concludes that defendants' actions (with the exception of defendant Mastright — see discussion below) in this case do not fall within the scope of absolute immunity under

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Meyers. Section 325 of the California Welfare and Institutions Code provides that "[a] proceeding in the juvenile court to declare a minor a dependent child of the court is commenced by the filing with the court . . . of a petition, in conformity with the requirements of this article." Defendants note that they filled out applications for Juvenile Court petitions before proceeding to plaintiffs' school to place them under protective custody. However, plaintiffs allege, and defendants do not dispute, that these applications were never filed with any court or agency. Copies of the applications submitted by defendants reveal that the "Disposition of Petition Application" sections remain blank. Moreover, defendants admit in their moving papers that Juvenile Dependency Petitions were not filed until February 3, 1994.

Defendants argue that *Meyers* is distinguishable. In *Meyers*, a social worker ordered a minor's father to stay away from his home until after a judicial hearing; this action occurred before the social worker had initiated judicial proceedings. The Court denied absolute immunity for the social worker's conduct because he "acted unilaterally prior to the operation of the judicial process." 812 F.2d at 1157.

Whereas the social worker in *Meyers* was acting beyond the scope of his authority, defendants here note that they had statutory authorization to place plaintiffs in protective custody prior to the official initiation of judicial proceedings. Section 313(a) provides that a minor "shall be released within 48 hours after having been taken into custody, excluding nonjudicial days, unless within said period of time a petition to declare him a dependent child has been filed pursuant to the provisions of this chapter." Here, defendants initiated judicial proceedings within 48 hours of detention as required by section 313(a). Thus, defendants claim that the removal decision could be construed

as a quasi-prosecutorial function relevant to the initiation of dependency proceedings and thus entitled them to absolute immunity.

This argument raises a fundamental question: did the Ninth Circuit in *Meyers* deny absolute immunity because the challenged action occurred before judicial proceedings had been instituted, or was the denial based on the fact that the social worker acted beyond the scope of his authority?

The language of the *Meyers* opinion is unambiguous to the Court: there is no absolute immunity for pre-proceedings actions. *Meyers*, 812 F.2d at 1157. Defendants' counsel has represented that a number of Ninth Circuit cases "make clear" defendants' entitlement to absolute immunity. When pressed by the Court at the hearing on this matter, however, counsel acknowledged that *Meyers* has not been overruled and remains the law of this Circuit. Thus, absolute immunity is not-proper under the facts presently before the Court. The Court believes that seizure of a child before the initiation of judicial proceedings is more akin to an emergency police action and thus is more properly within the realm of qualified, not absolute, immunity.

Other Circuits have reached the same conclusion. For example, the Second Circuit has applied the qualified immunity doctrine to the removal of children from their mother's custody before court proceedings were filed. *See Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977). The Fifth Circuit has ruled in a similar fashion. *See Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988). In *Hodorowski*, the Department of Human Services seized children without a court order. A Texas statute similar to California's section 306 authorized such removal where a social worker reasonably believed the child was in immediate danger.

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The Fifth Circuit held that absolute immunity did not apply because investigation of child abuse and seizure without a court order resembled a police, rather than a prosecutorial, function; police officers are not entitled to absolute immunity. *Id.* at 1214.

Defendants note that some California courts have applied absolute prosecutorial immunity to § 1983 claims against social workers for conduct during the investigative phases of their duties. *See, e.g., Jenkins v. County of Orange,* 212 Cal. App. 3d 278 (1989); *Alicia T. v. County of Los Angeles,* 222 Cal. App. 3d 869 (1990).

Defendants also cite a federal case from the Northern District of California which holds that an immediate decision to remove a child from the home should be protected by absolute immunity. *Mazor v. Shelton,* 637 F.Supp. 330 (N.D. Cal. 1986). However, defendant fails to note a crucial factual distinction between *Mazor* and this case: *Mazor* did not present a question of pre-judicial proceedings removal. In *Mazor,* the Department of Social Services filed a petition for temporary custody of plaintiff's children. A juvenile court ordered plaintiff's children to reside with their adoptive father. Subsequently, one of the children returned to reside with plaintiff. When plaintiff was admitted to a psychiatric hospital, a social worker placed the child in temporary custody in a foster home. Since judicial proceedings had already been instituted, and since the social worker's conduct merely fulfilled a court order, *Mazor* sheds little light on the question of absolute immunity in the present case.

The decisions of these other courts do not bind this court. The Court believes that *Meyers* remains the most authoritative precedent in this Circuit. It appears the actions at issue here

conformed to state law; however, since they occurred before the initiation of judicial proceedings, they warrant, at most, qualified immunity protection.

2. Participation in Court Proceedings

Plaintiff claims that defendants Tillotson and Mastright, at the direction of defendant PSSA, appeared at the dependency hearing to impede plaintiffs' return to their mother. Witnesses, including government witnesses, are absolutely immune from liability for their testimony. *Meyers,* 812 F.2d at 1156 (citing *Briscoe v. LaHue*, 103 S.Ct. 1108 (1983)). Thus, the Court finds as a matter of law that defendants are entitled to absolute immunity for these actions. Summary judgment on this claim is granted for defendants Tillotson and Mastright.

3. Visits to the School

Plaintiffs claim, and defendants do not dispute, that defendant Mastright attempted to contact plaintiffs at their school in March and May of 1994. Plaintiffs allege that these visits distressed and traumatized the girls.

Again, social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings. *Meyers,* 812 F.2d at 1157. Here, Mastright's actions occurred during the pendency of an active judicial proceeding. In her declaration, she testifies that she reported the results of her attempted contacts with plaintiffs to the court and was never instructed to correct or modify these attempted contacts. This testimony is uncontested. Since Mastright's attempts to interview plaintiffs were in pursuit of child dependency proceedings, the Court

concludes that Mastright is absolutely immune from liability. Summary judgment on this claim is granted.

B. Absolute Immunity for the State Claims

Defendants similarly claim absolute immunity for the alleged state law violations. California Government Code § 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." For purposes of determining immunity, a discretionary act is one which requires deliberation, decision and judgment. *Watts v. County of Sacramento*, 136 Cal. App. 3d 232 (1982). Social workers' investigation of child abuse and instigation of dependency proceedings are discretionary rather than ministerial, thus warranting absolute immunity. *Alicia T. v. County of Los Angeles*, 272 Cal. App. 3d 869 (1990).

Plaintiffs first claim that defendants violated § 308 by failing to inform plaintiffs' mother of the girls' exact location and failing to obtain a court order allowing such nondisclosure. However, § 308 clearly assigns a nondisclosure decision to a social worker's discretion, allowing nondisclosure even without a court order if there is reasonable belief that revealing a minor's location would endanger the minor. Plaintiffs further allege that defendants' failure to initiate phone contact within five hours after the children were taken into custody and refusal to allow communication violate § 308. Again, the statute allows the welfare department to exercise the discretion to forbid communication where contact would be detrimental to the child.

The Court finds as a matter of law that defendants' conduct falls within their necessary discretion to determine the conditions

of a minor's protective custody to protect the minor and prevent interference with the fact-finding process. Thus, defendants Tillotson and Mastright are absolutely immune for the alleged state law violations.

Government Code § 821.6 further provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." It is uncontested that defendants instituted dependency proceedings within the requisite 48 hours pursuant to Welfare and Institutions Code § 313. Section 306 also authorizes a social worker to take temporary custody of a minor, without a warrant, where there is immediate danger of sexual abuse. Thus, it appears to the Court that defendants' decisions relevant to the requirements of § 308 came within the scope of their employment. Indeed, plaintiffs admit in their Second Amended Complaint that all actions taken by defendants were within the course and scope of their employment. In short, government Code § 821.6 further mandates summary judgment for the individual defendants.

Government Code § 815.2 provides: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." Therefore, a county shares in the immunity provided to public employees by §§ 820.2 and 821.6. *Kemmerer v. County of Fresno,* 200 Cal. App. 3d 1426 (1988). Thus, since the Court finds defendants Tillotson and Mastright absolutely immune with regard to the state claim, defendants PSSA and Ventura County are likewise protected as a matter of law. In short, summary judgment is entered for all defendants on the state claim.

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C. Qualified Immunity for the § 1983 Claim

Defendants claim that, if absolute immunity does not attach, qualified immunity protects them from liability. The Ninth Circuit has held that a social worker is entitled to qualified immunity for actions prior to the commencement of judicial proceedings. *Meyers*, 812 F.2d at 1158. Since the Court has found that defendants are absolutely immune on the state claim, the Court need only examine the qualified immunity defense as it applies to the alleged federal civil rights violation.

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). The relevant statute, California Welfare and Institutions Code § 306(a), authorizes a social worker, acting under the direction of the juvenile court, to take temporary custody, without a warrant, if the social worker has a reasonable belief of immediate danger of sexual abuse or immediate threat to safety. The fundamental question, therefore, is whether defendants (and especially defendant Tillotson) could have reasonably believed Ashley and Maranda were in immediate danger of harm.

Defendants' Motion for Summary Judgment incorrectly alleges that the facts in this case are not in dispute. Plaintiffs, in fact, vigorously challenge defendants' version of the relevant events. Many of the contested facts seem relevant to a determination of defendants' reasonableness in their conduct. The Court believes that these disputes preclude a finding that the remaining defendants are immune from suit as a matter of law.

Appendix C

The following is a description of some of the disputed facts:

1. Therapist's Advice

Therapist Susan Hardy met with Matthew for examination and counseling. Defendants allege that Hardy informed defendant Tillotson on February 1, 1994 that Hardy felt Matthew should have no contact with Ashley. However, plaintiffs have submitted a declaration stating that Hardy does not recall recommending that Matthew be separated from his sisters. Hardy's declaration further claims that, after reviewing Tillotson's notes of the conversation, she would not have recommended separating the children without further investigation.

This disputed fact seems important to the Court in that it is relevant to determining the propriety of defendants' removal decision. Additionally, construing the issue in the plaintiffs' favor, as the Court is required to do, suggests that the situation in the family home did not represent the emergency scenario that defendants claim existed.

2. The Weekend of January 28-31, 1994

On February 1, 1994, while waiting at the school for Ashley, Maranda told defendant Tillotson that the entire family, including Ashley and Matthew, went kayaking the previous weekend and that Matthew was at the family home on Tuesday morning. This fact is undisputed. Later that afternoon, Ashley informed defendant Tillotson that she had not had any contact with her brother. This denial is also undisputed. Defendant Tillotson seems to have proceeded with the removal without attempting to corroborate either story.

Appendix C

In her deposition, plaintiffs' mother testified that Matthew spent the weekend in question in his grandparents home with his stepfather pursuant to the agreement with PSSA. Disagreement over the events of that weekend presents a genuine dispute about the "emergency" nature of the situation and whether defendants acted reasonably.

3. Matthew's Ability to Control his Conduct

In their Statement of Uncontroverted Facts, defendants claim that Matthew admitted in an interview with Detective Wilcox that he was unable to control his conduct. However, the interview summary does not document this statement. Matthew did explain that "it [the molestation] just keeps happening," but his inability to control himself is an inference Detective Wilcox made and recorded. Matthew's ability or inability to control his conduct seems important to the determination of whether defendants reasonably believed an emergency situation necessitating removal of the girls indeed existed in the household.

4. Question of Motive

There is evidence suggesting that the removal decision may not have been based on a fear of immediate danger in the home. The transcript of defendant Tillotson's testimony in the underlying custody hearing suggests that the decision may have been based, at least in part, on concern that Matthew's grandparents would return and object to the arrangement in which Matthew and his stepfather resided in the grandparents' home. The conflicting bases for defendants' conduct presents a question of fact which might shed light on the reasonableness of defendants' fear of immediate harm.

The Court concludes that these unresolved issues of fact preclude entering summary judgment for all defendants on a claim of qualified immunity.

E. Summary

1. Summary Judgment for Defendant Tillotson

In light of the above, the Court finds that defendant Tillotson is absolutely immune from suit for the alleged violations of § 308 and is thus entitled to summary judgment on the state claims.

However, given that *Meyers* denies absolute immunity for actions before dependency proceedings are initiated, the Court concludes that Tillotson is not entitled to absolute immunity for the § 1983 claim. The factual disputes outlined above also precludes the Court from deciding the issue of qualified immunity as a matter of law. Thus, summary judgment on the § 1983 claim is denied as to defendant Tillotson.

2. Summary Judgment for Defendant Mastright

For the same reasons applicable to Tillotson, the court concludes that Mastright is absolutely immune for the state claims and thus entitled to summary judgment.

Summary judgment for Mastright is also warranted on the § 1983 claim. There is no evidence that Mastright was involved in the removal decision. Defendant Mastright claims in her declaration that she was assigned the present dependency action on February 7, 1994 by Emergency Response Supervisor Jan Standing, long after the initiation of judicial proceedings. She

denies involvement in the decision to remove the girls from their mother. Thus, it would appear to the Court that Mastright is entitled to absolute immunity for her actions as warranted under *Myers.*

Plaintiffs have generally alleged that defendant Mastright was involved in the custody matter on February 1, 1994 and participated in the decision to remove Ashley and Maranda from their mother's custody. However, plaintiffs have not offered any evidence contradicting Mastright's assertions that she did not handle the dependency action until after February 7, 1994. At the hearing on this motion, plaintiffs alleged that Mastright's deposition testimony establishes that she *should* have been involved earlier given her supervisory position. However, there is nothing in the record to support this contention, since plaintiffs failed to submit any such deposition testimony or any other relevant evidence with their Opposition papers. Thus, summary judgment on the § 1983 claim is granted in defendant Mastright's favor.

3. Summary Judgment for Defendants PSSA and Ventura County

Pursuant to California Government Code § 815.2, the municipal defendants are immune from liability for the state claims because the employees are immune.

The Court also finds that defendants PSSA and Ventura County are not liable for the § 1983 claim. While municipal bodies are not entitled to absolute immunity from suit under § 1983, they cannot be held liable for civil rights violations on a respondent superior theory. *Monell v. Dept. of Social Servs. of City of N.Y.*, 98 S. Ct. 2018 (1978). Rather, it must be

demonstrated that the constitutional injury resulted from a municipal policy or custom. *Weatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1162 (1993).

Plaintiffs' Second Amended Complaint alleges that PSSA's actions were part of a pattern of similar misconduct of routinely "snatching" children from parental custody without judicial authorization. However, plaintiffs have offered nothing in the way of evidence establishing such a pattern or practice of misconduct. At the hearing on this matter, plaintiffs' counsel claimed certain deposition testimony supported plaintiffs' allegations. However, plaintiffs failed to submit this deposition testimony with their Opposition to defendants' Motion for Summary Judgment. Thus, there is nothing in the record which would preclude the Court from entering summary judgment in the municipal defendants' favor.

The Court also notes that a showing that children are routinely "snatched" from parental custody without judicial authorization does not necessarily constitute a showing of misconduct. As discussed above, state statutes allow social workers to take children into immediate custody without a judicial order if the exigencies of the particular situation so require. In short, bare assertions by plaintiffs of "snatchings" do not rise to the level of probative evidence of a pattern or practice of actual misconduct on the part of Ventura County and PSSA, at least as envisioned under *Monell*. The Court enters summary judgment for municipal defendants.

F. Punitive Damages

If the Court declines to enter summary judgment for

defendants, defendants request that the Court adjudicate plaintiffs' claims for punitive damages against defendants Tillotson, Mastright, and PSSA.

1. §1983 Claim

Punitive damages are available in a § 1983 action when the defendant's conduct is "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 103 S. Ct. 1625, 1640 (1983). Thus, plaintiffs may be awarded punitive damages upon evidence of reckless indifference, even if actual intent to injure is not proven.

Defendants claim that there is no evidence of evil motive or reckless indifference by any of the defendants. Plaintiffs respond that defendants detained Ashley and Maranda out of revenge against the girls' parents for questioning PSSA procedures. Although the evidence in this regard is rather weak, the court believes that some unresolved questions of fact remain at this time that preclude a finding that punitive damages are necessarily inappropriate here. Thus, the court denies defendants' motion with regard to punitive damages on the § 1983 claim.

2. State Claim

The plaintiffs' request for punitive damages on the state claim is no longer viable in light of the Court's ruling that defendants are absolutely immune from liability here. Thus, summary judgment is entered for defendants on this claim.

Appendix C

VI. Conclusion

In accordance with the foregoing, the Court hereby GRANTS in part, and DENIES in part, defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: 8/18/95

s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-55123

D.C. No. CV-95-01756-SVW

CYNTHIA MYERS, an an individual and as Guardian Ad Litem for Does 1 and 2,

Plaintiff-Appellant,

v.

COUNTY OF VENTURA; VENTURA COUNTY PUBLIC SOCIAL SERVICES AGENCY,

Defendants,

and

BARBARA TILLOTSON, individually and as an employee of Ventura County Public Social Services Agency,

Defendant-Appellee.

ORDER

Before: MAGILL,* RYMER, and THOMAS, Circuit Judges.

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* Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix D

The panel has voted to deny the petition for rehearing. Judges Rymer and Thomas vote to reject the suggestion for rehearing en banc and Judge Magill so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.